

DoD Office of General Counsel

Data Rights in DoD Procurements: Statutory & Regulatory Developments



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Thank you.

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Overview

- Overview of “Data Rights” in Government Contracts
 - The Changing Statutory and Regulatory Landscape
 - Better Buying Power – Data Rights and Open Architecture
 - Questions?
-

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Part One

Data Rights* in Government Contracts

** Rights in Technical Data and Computer Software*

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IP in Procurement Contracts

- **“Patent Rights” → Rights in Inventions & Patents (FAR Part 27.2, .3)**
 - Subject Inventions – mandatory, non-negotiable
 - Background Inventions – no coverage
 - 3rd Party Inventions – authorization & consent
- **“Data Rights” → Rights in Technical Data and Computer Software (FAR 27.4; DFARS 227.71 & .72)**
 - Hybrid License – trade secrets & copyright & ...
 - Commercial vs. Non-commercial
 - Negotiation vs. standard or “default” licenses
 - Standard licenses based on who funded

As of:

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Overview – Data Rights ...

- **Tech Data vs. Computer Software**
- **Deliverables vs. Data Rights**
- **License Rights**
 - Noncommercial technologies
 - Commercial technologies
 - Doctrine of Segregability (divide & conquer!)
 - Negotiated Licenses
- **Subcontracting issues**
- **Data Rights in Source Selection!!!!**

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License Rights in TD & CS

- **"Hybrid" license – covers specific activities**
 - Use; modify; reproduce; perform; display; release or disclose; and ... access? (Ok, this one is a new entry)
- **Rights Determined in THREE primary ways**
 - By negotiation – mutual agreement
 - By "default": funding for development; type of deliverable; commercial technology?; data vs. software
 - Commercial Software: we use THEIR license as baseline
- **Doctrine of Segregability (a.k.a. "divide & conquer"):**
 - Rights determined at the "lowest practical segregable level"

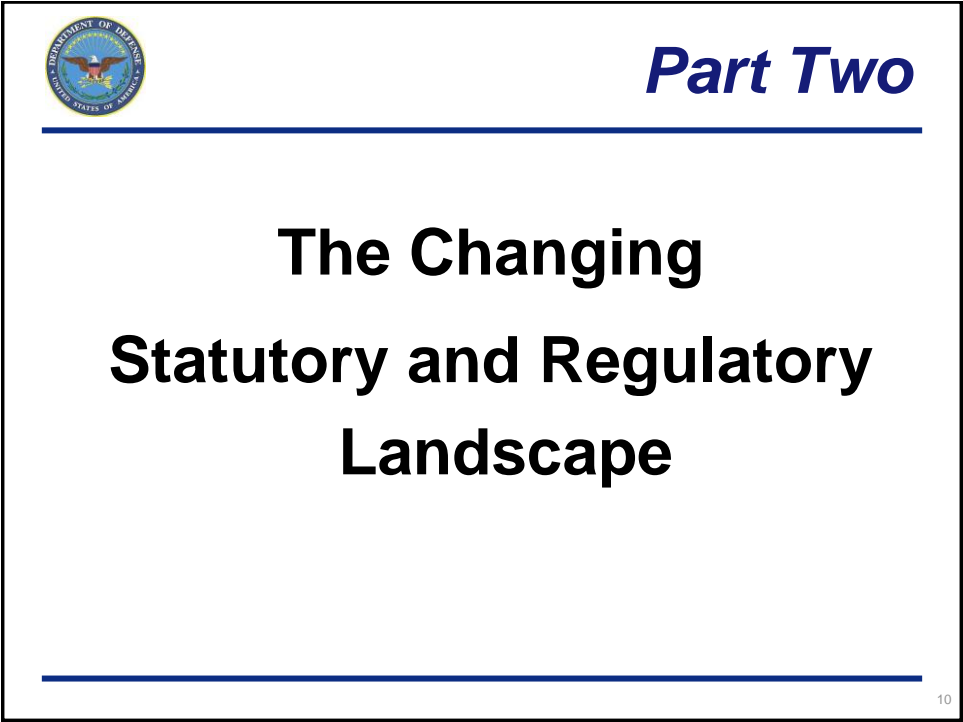
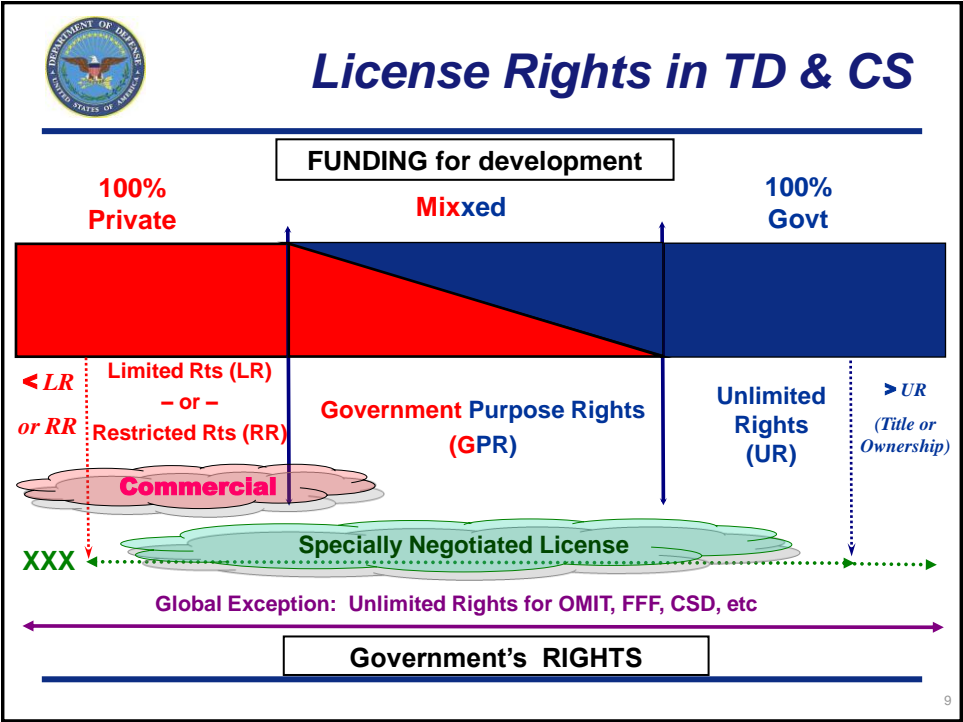
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The "Hybrid" License

- | | | |
|--|--|---|
| <ul style="list-style-type: none">● Copyright<ul style="list-style-type: none">■ Reproduce■ Prepare Derivatives■ Perform■ Display■ Distribute● Trade Secret<ul style="list-style-type: none">■ Any/all activities■ Focus on release & disclosure | | <ul style="list-style-type: none">■ "Data Rights"<ul style="list-style-type: none">■ Use■ Reproduce■ Modify■ Perform■ Display■ Release■ Disclose■ <i>[FAR: distribute]</i>■ <i>Access? (see DFARS 227 rewrite)</i> |
|--|--|---|

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Overview of the Changing Legal Landsape

- **FY 2007: § 802**
 - (a) Assess data reqts in all Acq Strategies
 - (b) Presume development at Govt expense for major systems
- **FY 2008: § 815(a)(2) → COTS exception to 802(b)**
- **FY 2009: § 822 → data rights for "non-FAR" agreements**
- **FY 2010: § 821 → Support contractor access to data...**
- **FY 2011: § 824 → IR&D funding & erroneous assertions**
 - Also: § 801 → Litigation support contractor access...

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FY2007 NDAA § 802(a) – DoD Implementation

- **DoD Instruction 5000.02 (12/08/08) -- Encl. 12, ¶ 9**
 - ~ “codification” of USD(AT&L) Memo, Data Management and Technical Data Rights, 19 July 2007
- **DFARS 2006-D055, Additional req'ts relating to tech data rights**
 - Added DFARS 207.106(s-70)
 - Amended DFARS 227.7103-1(f) & 227.7203-1(e)
 - Interim Rule: 72 FR 51188, September 06, 2007
 - Final Rule: 74 FR 68699, December 29, 2009
- **NOTE: long-standing guidance**
 - DFARS 227.7103-2 & 7203-2 ... dating from 1995...1988...1960s
 - USD(AT&L)'s guidebook "IP: Navigating Through Commercial Waters" – October 2001

As of:

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FY2007 § 802(b) & FY2008 § 815(a)(2)

- **Special presumptions of Development Exclusively at Private Expense (DEPE):**
 - Since 1995 – the “Commercial Rule”: Commercial Items → must presume DEPE ...
 - ... **Unless** it's a Major System → presume developed exclusively at Govt expense (DEGE) (“Major Systems Rule”)...
 - **Unless** it's COTS → then the Commercial Rule
- **DFARS Case 2007-D003, “Presumption of Development [Exclusively] at Private Expense”**
 - Proposed Rule: 75 FR 25161, May 7, 2010
 - Final Rule: 76 FR 57144, September 20, 2011

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FY09 NDAA – IP related sections

- **Sec. 803. Commercial Software Reuse Preference.**
- **Sec. 822. Technical Data Rights: More on data/rights in acquisition strategies & life cycle planning**
 - For “non-FAR transactions”
 - Report on implementation of FY07 § 802(a)
- **Sec. 824. Modification And Extension Of Pilot Program For Transition To Follow-On Contracts Under Authority To Carry Out Certain Prototype Projects.**
- **Sec. 825. Clarification Of Status Of Government Rights In The Designs Of Department Of Defense Vessels, Boats, Craft, And Components Thereof.**
- **Sec. 881. Expansion Of Authority To Retain Fees From Licensing Of Intellectual Property.**

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FY10 NDAA § 821

- **Support contractor access to proprietary tech data**
 - Defined “Covered Government Support Contractor”
 - USG may release proprietary tech data to [CGSC]
 - CGSC will-
 - Protect & use only for performance of the USG contract
 - Enter into a non-disclosure agreement (NDA) directly with the Owner of the proprietary data
- **DFARS Case 2009-D031: Government Support Contractor Access to Technical Data**
 - Applies to ALL tech data; and NON-commercial software
 - “Direct” NDA is at the discretion of the Owner of the data/software
 - Interim Rule: 76 FR 11363 (March 02, 2011)
 - Final Rule: ____ FR ____

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FY2011 NDAA -- §§ 801 & 824

- **§ 801: Litigation Support Contractors access to proprietary data**
 - Similar to approach for “Covered Govt Support Contractors” (DFARS 2009-D031)
 - No “direct NDA” requirement
 - DFARS Case 2011-D018:
 - Interim Rule: ____ FR ____
- **§ 824: IR&D and B&P funding; Erroneous Assertions**
 - Treatment of Independent R&D (IR&D), and Bid & Proposal (B&P) funding → as either Private or Govt funding
 - Special Procedures for Erroneous Assertions of Restrictions on Data Related to Items Developed Exclusively at Govt Expense
 - DFARS Case 2011-D022:
 - Proposed/Interim Rule: ____ FR ____

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Section 824

- **Treatment of IR&D and B&P funding**
 - Historically: treated as PRIVATE funding
 - Now --
 - Treated as PRIVATE \$\$ when otherwise DE[P]E*
 - Treated as GOVT \$\$ when otherwise DE[G]E*
- * NOTE: DE[?]E = Developed Exclusively at [?] Expense
[?] = P → Private or G → Government
- **Special Procedures for Erroneous Assertions of Restrictions on Data Related to Items Developed Exclusively at Govt Expense**
 - Govt can require UR as condition of award/responsive
 - No time limits on challenging assertion of restrictions

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The Chameleon

"shall be
considered to be
Federal funds for
the purposes of ..."


"... an item or process
that is developed ...
exclusively with
Federal funds"

"shall not be
considered to be
Federal funds for
the purposes of ..."

"... an item or process
that is developed ...
exclusively at
private expense"

[Excerpts from 2320: Top → from (a)(3) // Bottom → from (a)(2)(A) on left, and (a)(2)(B) on right]

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The Statutory Use Cases

Use Case	Private	Government	IR&D / B&P
1	X	X	X
2		X	X (→ Govt \$)
3	X		X (→ Private \$)
4			X

■ Case 2: 2320(a)(2)(A) → DEGE → treated as Govt \$\$

■ Case 3: 2320(a)(2)(B) → DEPE → treated as Private \$\$

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The Chameleon


When surrounded
ONLY by
Government
funding . . .

. . . it is treated as
Government
funding

When surrounded
ONLY by
Private
funding . . .

. . . it is treated as
Private
funding

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And now for something completely different...?

Use Case	Private	Government	IR&D / B&P
1	X	X	X ????
2		X	X
3	X		X
4			X ?????

- **Case 1: Neither (2)(A) nor (2)(B) can apply**
(Note: 2(A) = DEGE; and 2(B) = DEPE)
- **Case 4: Both (2)(A) and (2)(B) could apply**

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Non-Statutory DFARS Cases

- **DFARS Case 2010-D001: DFARS Part 227 "Transformation" (a.k.a. "227 Rewrite")**
 - Proposed Rule: 75 FR 59412 (Sept 27, 2010)
 - Comment Period Extended: 75 FR 72777 (Nov 26, 2010)
 - Queued up after the "statutory cases"
- **DFARS Case 2010-D007: Use of Draft Technical Data**
 - Emerging issue – re rights/markings for --
 - ... Draft or in-progress reviews
 - ... Remote access ... informal or as delivery
 - Closed to a Holding File: DFARS 2011-H018.

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Part Three

Better Buying Power – Data Rights and Open Systems Architectures

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Guidance for Open Architecture and Technical Data Rights

- **Emphasis on properly acquiring technical data rights continues in the effort to achieve affordability**
- **Implementation Directive for Better Buying Power - Obtaining Greater Efficiency and Productivity in Defense Spending (Nov 3, 2010)**
 - *Require open systems architectures and set rules for acquisition of technical data rights:* Effective November 15, 2010, you will conduct a business case analysis, in consort with the engineering tradeoff analysis that will be presented at MS B. The business case analysis will outline the open systems architecture approach, combined with technical data rights the government will pursue in order to ensure a lifetime consideration of competition in the acquisition of weapon systems. The results of this analysis will be reported in the Acquisition Strategy Report and in the competition strategy.

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Multiple Parallel Activities (see <https://acc.dau.mil/oa>)

- **The Data Rights Brochure**
- **DoD Open Systems Architecture Contract Guidebook**
 - See Naval OA Contract Guidebook, v2.0
- **Business Case Analysis – Guide for Open Systems Architecture & Data Rights**
- **Update - DoD Instruction 5000.02, Encl. 12, ¶ 9**
- **Update – Defense Acquisition Guidebook**
 - Chapters 2, 4, 5, 7, 12
- **Integrate – Defense Acquisition University (DAU) course**

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The Data Rights Brochure

Have you developed your Data Management Strategy (DMS)?
Program Managers shall assess the data required to design, manufacture, and sustain the system—including in-house uses, as well as competitive outsourcing—in their sustainment planning and Acquisition Strategies.



The DMS is to be integrated with the program:



Army Guide for the Preparation of a Program Product Data Management Strategy

DATA MANAGEMENT AND DATA RIGHTS RESOURCES

- Laws, Regulations, Policies, and Instructions
 - Title 10, U.S. Code, Sections 2320 and 2321
 - Defense Federal Acquisition Regulation Supplement (DFARS)
 - 227.71 (Rights in Technical Data)
 - 227.72 (Rights in Computer Software and Computer Software Documentation)
 - 252.227-7013, -7014, -7015, -7018
 - OSD Policy Memo, Clarifying Guidance Regarding Open Source Software (OSS), 18 Oct 2009
 - DoD 5000.02, Operation of the Defense Acquisition System, Enclosure 12, Section 9, Dec. 2008
 - DoD 5010.12-M, Procedures for the Acquisition and Management of Technical Data, May 1993 (under revision)
 - Additional Guidance
 - Army Guide for the Preparation of a Program Product Data Management Strategy
 - Naval Open Architecture Contract Guidebook for Program Managers
 - Acquiring and Enforcing the Government's Rights in Technical Data and Computer Software Under Department of Defense Contracts, Air Force Space and Missile Systems Center
- Please visit <https://acc.dau.mil/oa> for additional information and resources

Better Buying Power Understanding and Leveraging Data Rights in DoD Acquisitions



Prepared by the
Department of Defense Open Architecture Team
July 7, 2011



Statement A

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Questions?

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BACKUP SLIDES

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License Rights in TD & CS

Default by Funding: More funding → more rights

- 100% Govt Funded → Unlimited Rights (UR)
- Mixed Govt-Private → Govt Purpose Rts (GPR)
- 100% Private → Limited Rights (LR) (for all TD)
Restricted Rights (RR) (for CS)
 - Note: Commercial TD ~LR → Presumption of ...Private Expense
- BUT – Doctrine of Segregability!!!

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Non-Commercial TD & CS Licenses


	In-house Rights*	Out-house Rights*
Unlimited Rights (UR)	Unlimited. No kidding.	
Govt Purpose Rights (GPR)	Unlimited	Only Govt Purposes; no commercial use
Limited Rights (LR) or Restricted Rights (RR)	~Unlimited – except no use for manufacture	Only Emergency repairs; some software maintenance
Specially Negotiated License Rights	Anything by mutual agreement (but not less than LR or RR)	

* Rights → to use, reproduce, modify, perform, display, release, and disclose

Commercial TD & CS Licenses

	In-house Rights*	Out-house Rights*
Unlimited Rights (UR) (only certain types of TD)	Unlimited. No kidding.	
Normal Commercial License (for CS ...only?)	"Standard" license for other customers – provided it is OK under Federal law ... <u>and</u> meets agencies needs	
Standard "7015" Clause" Rights (~Limited Rights -- for TD only)	~Unlimited – except no use for manufacture	Only Emergency repairs
Specially Negotiated License Rights	Anything by mutual agreement (but not less than the Standard ~LR in TD)	

* Rights ➔ to use, reproduce, modify, perform, display, release, and disclose

	DoDI 5000.02 – Encl. 12, Systems Engineering
9. DATA MANAGEMENT AND TECHNICAL DATA RIGHTS	
a. Program Managers for ACAT I and II programs , regardless of planned sustainment approach, shall assess the long-term technical data needs of their systems and reflect that assessment in a Data Management Strategy (DMS). The DMS shall:	
(1) Be integrated with other life-cycle sustainment planning and included in the Acquisition Strategy;	
(2) Assess the data required to design, manufacture, and sustain the system, as well as to support re-competition for production, sustainment, or upgrades; and	
(3) Address the merits of including a priced contract option for the future delivery of technical data and intellectual property rights not acquired upon initial contract award and shall consider the contractor's responsibility to verify any assertion of restricted use and release of data.	
b. The DMS shall be approved in the context of the Acquisition Strategy prior to issuing a contract solicitation.	
As of:	34



2320(a)(3) – as amended

(3) The Secretary of Defense shall define the terms "developed", "exclusively with Federal funds", and "exclusively at private expense" in regulations prescribed under paragraph (1). In defining such terms, the Secretary shall specify the manner in which indirect costs shall be treated and shall specify that amounts spent for **independent research & development and bid and proposal costs** ...

... **shall not be considered to be Federal funds for the purposes of paragraph (2)(B), ...**

...**but shall be considered to be Federal funds for the purposes of paragraph (2)(A).**

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2320(a)(2) – excerpts

(2)(A) In the case of an item or process that is developed by a contractor or subcontractor exclusively with Federal funds (other than an item or process developed under a contract or subcontract to which regulations under section 9(j)(2) of the Small Business Act (15 U.S.C. 638(j)(2)) apply), the United States shall have the **unlimited right** to--

- (i) use technical data pertaining to the item or process; or
- (ii) release or disclose the technical data to persons outside the Government or permit the use of the technical data by such persons.

(2)(B) Except as provided in subparagraphs (C) and (D), in the case of an item or process that is developed by a contractor or subcontractor exclusively at private expense, the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the Government, or permit the use of the technical data by such persons.

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2320(a)(2)(F) – as amended

(F) A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract--

(i) to sell or otherwise relinquish to the United States any rights in technical data except--

(I) rights in technical data described in subparagraph [(a)(2)](A) for which a use or release restriction has been erroneously asserted by a contractor or subcontractor;

(II) rights in technical data described in subparagraph (C);

or

(III) under the conditions described in subparagraph (D);

or

(ii) to refrain from offering to use, or from using, an item or process to which the contractor is entitled to restrict rights in data under subparagraph (B).

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2321(d)(2) – as amended

(2) (A) Except as provided in subparagraph (C), a **challenge** to an asserted use or release restriction **may not be made** under paragraph

(1) **after the end of the three-year period** described in subparagraph

(B) unless the technical data involved--

(i) are publicly available;

(ii) have been furnished to the United States without restriction; or

(iii) have been otherwise made available without restriction.

(B) The three-year period referred to in subparagraph (A) is the three-year period beginning on the later of--

(i) the date on which final payment is made on the contract under which the technical data are required to be delivered; or

(ii) the date on which the technical data are delivered under the contract.

(C) The limitation in this paragraph shall not apply to a case in which the Secretary finds that reasonable grounds exist to believe that a contractor or subcontractor has erroneously asserted a use or release restriction with regard to technical data described in section 2320(a)(2)(A) of this title.

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Rule 1: Anticipate and plan for sustainment over the entire system life cycle

- **Data and license rights are necessary for critical sustainment activities, including :**
 - reprocurement of additional systems or spares;
 - maintenance;
 - repair;
 - modification or interfacing or interoperability with other systems; and
 - upgrades or technology insertion
 - **Data and license rights are needed for both in-house and competitively outsourced activities.**
 - **When in doubt: consider a PRICED OPTION for data and associated license rights**
-

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Rule 2: Ensure Return on Investment (ROI) for USG-funded development

- **The MOST expensive way to acquire technology or IP is to develop it yourself**
 - **IP rights are the "reward" for those who invest, risk, and ... come up with something cool**
 - **If the USG has paid for development → it MUST take steps to ensure ROI**
 - **Example: Require delivery of data related to any/all technology developed under the contract. Period.**
 - **The Challenge: finding a way to retrieve and SHARE the good stuff when you need it, or it's relevant**
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Rule 3: Don't make an unnecessary "grab" for proprietary data or rights

- **DoD Policy: acquire only the MINIMUM**
 - Data deliverables, and
 - Data rights ...
... that are necessary to meet your needs
 - **No "inherent" value in acquiring a bunch of data or rights -- If you can't ...**
 - **... Make your "Business Case"**
 - **When in doubt: consider a PRICED OPTION**
-

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Rule 4: Do it EARLY and ALWAYS: Evaluation of Data/Rights in Source Selection

- **Mandatory PRE-Award Assertion of Restrictions (for non-commercial)**
 - USG must supplement for commercial stuff
 - **Delivery requirement (or option) is the trigger**
 - **MUST include data deliverables and rights as an EVALUATION FACTOR in source selection**
 - Both competitive and sole source awards
 - **Do NOT betoo... afraid of 10 U.S.C. 2320(a)(2)(F)**
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Contractor Assertion of Restrictions – Early ID & Marking

- **Early identification -- notice of assertions**
 - Pre-Award – with the Proposal
 - Post-Award Update
 - Current DFARS – not required for commercial!
- **Marking requirements.**
 - Always, always, always
 - Contractor's obligation
 - Noncommercial are specified word-for-word
 - Commercial – any notice (best practices)

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Source Selection – the "Musts"

- **Data Deliverable:** you must CREATE delivery requirements
 - When in doubt – OPTIONS
 - Priced [option] CLINs (if NSP, then "exercise" the option upfront)
- **Data Rights:** require Offeror to ASSERT restrictions UP-FRONT
 - Standard clause for NONcommercial (DFARS 252.227-7017)
 - you MUST supplement this requirement for commercial
- **Explanation of the proposal** – Offeror explanation of data rights elements – how delivery/rights affect other aspects of the effort
- **Evaluation:** Data/software delivery and rights MUST be evaluated
- **Interest-based negotiations**, flexibility ... but stand firm on
 - data needed for requirements (be sure to consider non-data alternatives)
 - Return on Investment

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The 800lb Gorilla

- **10 U.S.C. 2320(a)(2)(F)** A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract—
 - (i) to sell or otherwise relinquish to the United States any rights in technical data except—
 - (I) *rights in technical data described in subparagraph (A) for which a use or release restriction has been erroneously asserted by a contractor or subcontractor* ;
 - (II) rights in technical data described in subparagraph (C); or
 - (III) under the conditions described in subparagraph (D); or
 - (ii) to refrain from offering to use, or from using, an item or process to which the contractor is entitled to restrict rights in data under subparagraph (B).

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Ok... more from 10 USC 2320(a)(2)

- (A) In the case of an item or process that is developed by a contractor or subcontractor exclusively with Federal funds (other than an item or process developed under a contract or subcontract to which regulations under section 9(j)(2) of the Small Business Act (15 U.S.C. 638(j)(2)) apply), the United States shall have the unlimited right to--
 - (i) use technical data pertaining to the item or process; or
 - (ii) release or disclose the technical data to persons outside the Government or permit the use of the technical data by such persons.
- (B) Except as provided in subparagraphs (C) and (D), in the case of an item or process that is developed by a contractor or subcontractor exclusively at private expense, the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons.
- (C) Subparagraph (B) does not apply to technical data that—
 - (i) constitutes a correction or change to data furnished by the United States;
 - (ii) relates to form, fit, or function;
 - (iii) is necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data) [“OMIT” data]; or
 - (iv) is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction on further release or disclosure.
- (D) Notwithstanding subparagraph (B), the United States may release or disclose technical data to persons outside the Government, or permit the use of technical data by such persons, if—
 - (i) such release, disclosure, or use—
 - (I) is necessary for emergency repair and overhaul; or
 - (II) is a release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the United States and is required for evaluational or informational purposes;
 - (ii) such release, disclosure, or use is made subject to a [Non-Disclosure] prohibition that the person to whom the data is released or disclosed may not further release, disclose, or use such data; and
 - (iii) the contractor or subcontractor asserting the restriction is notified of such release, disclosure, or use.

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What does all this mean?

- **Evaluation vs. Condition of responsiveness/award**
- **Primarily directed to RIGHTS ... vice deliverable**
 - But see policy restrictions regarding commercial deliverables
- **Exceptions to the prohibition**
 - **Statutory carveouts – special types of data; special circumstances**
 - **Mandatory vs. voluntary/arms-length negotiation**
- **Issue: Evaluation factors as “de facto” condition of ...**